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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1924

JAMES R. MUNIZ AND BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL NO. 70, IBTCHWA,

Petitioners,

VS.

ROY O. HOFFMAN, DIRECTOR, REGION 20, NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Respondent, California Newspapers, Inc., d/b/a San Rafael Independent Journal

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I
JURISDICTION

The petition for writ of certiorari was granted on November 11, 1974, limited to two questions, namely, questions 3 and 4 in the petition.

II
QUESTIONS PRESENTED

The questions are as stated in petitioners' brief, however, they appear in reverse order from their appearance in the petition.

III
STATUTES INVOLVED

Part of the relevant statutory provisions are set forth in petitioners' brief, p. 3. In addition, there is involved Section 11 of the Norris-LaGuardia Act, 47 Stat. 72, which was repealed by 62 Stat. 862. 47 Stat. 72, provided:

> In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

IV
STATEMENT OF THE CASE

Contrary to the statement by petitioners, the Board's Regional Director in his petition, accompanied by affidavits, for adjudication of civil and criminal contempt, included petitioners.

Also contrary to the impression which petitioners seek to leave and the statements that "Local 70's involvement . . . was, according to the National Labor Relations Board, reflected by the presence of petitioner James Muniz, the President of Local 70, and business agents of the Local in Marin County", the evidence is overwhelming as to the active participation by Muniz and Local 70 in the efforts to shut down the County (Tr. 2728).[1]

1. In their petition for the writ, both Local 70 and Muniz admitted engaging in violations of the Labor-Management Relations Act, but urged that what they did was not prohibited by the injunctions. Since the issue is confined solely to two legal points respecting whether petitioners were entitled to a jury trial, it does not seem necessary to detail the facts of the various violations by petitioners for the purpose of consideration of the issue.

Contrary to petitioners' statement that the District Court refused to bifurcate the civil and criminal contempt proceedings, the Court did sever them by proceeding to try the criminal contempt first. The Court stated that such evidence would be heard under the rules pertaining to criminal contempt and would at the conclusion thereof be considered as evidence in the civil matter with the right of the parties to produce such additional evidence as they may desire in the civil matter (Tr. 106, 107, 115).[2]

V
SUMMARY OF THE ARGUMENT

There is no constitutional right to a jury trial in every criminal proceeding. Criminal contempt proceedings are not criminal actions, but an offense *sui generis. Cheff v. Schnackenberg,* 384 U.S. 373, 380; *United States v. Barnett,* 376 U.S. 681.

The amount of a fine in a contempt proceeding does not *ipso facto* make the offense a "serious" one requiring a jury trial.

18 U.S.C. § 3692 does not mandate a jury trial in contempt proceedings resulting from violations of injunctions issued under the Labor-Management Relations Act, 1947, as amended. Section 3692 was formerly 47 Stat. 72, § 11 and was part of the Norris-La Guardia Act, which does not apply to injunctions under the Labor-Management Relations Act.

2. However, in their petition, these petitioners stated the Court bifurcated the proceedings and tried the criminal contempt first (p. 10, note 5).

Petitioners are not in a position to raise either the constitutional or statutory issues with respect to a jury trial since they did not raise them in the Court below.

VI

ARGUMENT

1. A Fine in Excess of $500 Does Not Constitutionally Require a Jury Trial

Local 70 argues that a fine of more than $500 makes the offense a "serious' rather than a petty one, and therefore, under Article III, Section 2 and the Sixth Amendment to the Constitution, a jury trial is a matter of right. Local 70 was fined $25,000 of which $15,000 was suspended for one year subject to being remitted if there were no subsequent violations of the injunctions (G.A. 43a-44a). Muniz was placed on probation for one year, subject to the Court's right to shorten or extend that period (G.A. 45a-46a).

This Court in *Cheff v. Schnackenberg,* 384 U.S. 373, 86 S.Ct. 1523, where Article III and the Sixth Amendment were also urged, reiterated that the decisions of this Court settled the rule that the right to a trial by jury "does not extend to every criminal proceeding." It was held that since *Cheff* received a sentence of six months imprisonment, and since the nature of criminal contempt, an offense *sui generis,* does not, of itself warrant treatment otherwise, that Cheff's offense can be treated only as "petty" in the eyes of the statute and this Court's prior decisions.[3] In an

3. This Court stated that in *United States v. Barnett* [376 U.S. 681] it held that criminal contempt proceedings were not criminal actions falling within the requirements of Article III and the Sixth Amendment. It was pointed out that some members of the Court in that case were of the view that without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses. 384 U.S. 378-379.

Again in *Codispoti v. Pennsylvania* ..... U.S. ....., 94 S.Ct. 2687, at 2688, this Court stated that "an alleged contemnor is not entitled to a jury trial whenever a strong possibility exists that upon conviction he will face a substantial term of imprisonment regardless of the punishment actually imposed." In a case decided the same day as *Codispoti*, this Court in *Taylor v. Hayes* ..... U.S. ....., 94 S.Ct. 2697, at 2701, stated "Petitioner contends that any charge of contempt of court, without exception, must be tried to a jury. Quite to the contrary, however, our cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute." (Citing among others *Cheff v. Schnackenberg, supra*)

earlier opinion, not since overruled, this Court held that criminal contempts are not subject to jury trial as a matter of constitutional right. *Green v. United States,* 356 U.S. 183, 78 S.Ct. 632, 643. As a further recognition that criminal contempt proceedings are not crimes, this Court said in *Green* that while criminal contempt proceedings have traditionally been surrounded with many of the protections available in a criminal trial, it has never suggested that such protections included the right to grand jury indictments, 356 U.S. 183-184.

It was also pointed out in *Cheff* that the corporation of which *Cheff* was an officer was fined $100,000 in the same contempt proceeding and that the corporation's petition for a writ of certiorari was denied, 384 U.S. 375. *Holland Furnace Co. v. Schnackenberg,* 381 U.S. 924, 85 S.Ct. 1559.

In *Cheff,* recognizing that by limiting its decision to cases where a six months sentence was imposed may leave the lower courts "at sea" in instances involving greater sentences, this Court in the exercise of its supervisory power over the federal courts and under the peculiar power of the federal courts to revise sentences in contempt cases, ruled further that sentences exceeding six months for criminal contempt may not be imposed by federal courts

absent a jury trial or waiver thereof.[4] Neither in *Cheff* nor in subsequent decisions dealing with penalties imposed without a jury trial has this Court indicated that a jury trial is required where a fine in excess of $500 was imposed. This Court has consistently declined to review criminal contempt proceedings in which fines exceeding $500 were imposed without a jury trial or waiver thereof. *Bloom v. Illinois,* 391 U.S. 194, 88 S.Ct. 1477 (state court criminal contempt); *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444 (state court conviction for misdemeanor).

In *Duncan,* this Court said it need not settle "the exact location of the line between petty offenses and serious crimes", but that "a crime punishable by two years in prison is . . . a serious crime and not a petty offense." 391 U.S. at 161, 162, 88 S.Ct. at 1454. In *Bloom,* this Court said that its "analysis of *Barnett*[5] . . . and *Cheff v. Schnackenberg* . . . makes it clear that criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved." 391 U.S. at 211, 88 S.Ct. at 1487.[6]

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4. This Court indicated that it was guided in part by 18 U.S.C. 1(3), which provides that "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

5. *United States v. Barnett,* 376 U.S. 681, 84 S.Ct. 984.

6. *In re Local 825, Operating Engineers,* 57 LRRM 2143 (C.A. 3, 1964), cert. den. 379 U.S. 934, 85 S.Ct. 326 (union fined $15,000 and its business manager fined $5000); *In re Holland Furnace Company,* 341 F.2d 548 (C.A. 7, 1965), cert. den. (*Holland Furnace Company v. Elmer J. Schnackenberg*) 381 U.S. 924, 85 S.Ct. 1559 (Company was fined $100,000); *In re Jersey City Education Ass'n.,* 115 N.J. Super. 42, 287 A. 2d 206, 213-215, cert. den., 404 U.S. 948, 92 S.Ct. 268, *sub nom Jersey City Education Association Et. al. v. New Jersey* (union fined $10,000); *In re Fair Lawn Education Ass'n.,* 63 N.J. 112, 305 A. 2d 72, cert. den. 414 U.S. 855, 94 S.Ct. 155, *sub nom Fair Lawn Education Association v. New Jersey* (union with only 347 members fined $17,350); *Rankin v. Shanker,* 23 N.Y. 2d 211, 242 N.E. 2d 802, 807-808, stay denied, 393 U.S. 930, 89 S.Ct. 289, *sub nom Shanker v. Rankin.*

It seems obvious from *Cheff* and the subsequent decisions that the amount of the fine is not the determinative factor as to whether a jury trial shall or shall not be granted. It would also appear obvious that this Court's concern was with the deprivation of liberty and not the monetary penalty.

This Court has said that in determining whether a particular offense can be classified as "petty", it "has sought objective indications of the seriousness with which society regards the offense" and that "the most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission." *Frank v. United States,* 395 U.S. 147, 148, 89 S.Ct. 1503, 1505; *District of Columbia v. Clawans,* 300 U.S. 617, 57 S.Ct. 660. However, as this Court pointed out, while in the ordinary criminal prosecution, the penalty authorized and not the penalty actually imposed is the relevant criterion, because the legislature in such cases has included within the definition of the crime itself, a judgment about the seriousness of the offense, that in criminal contempt cases the situation is different. A person may be found in contempt of court for a great many different types of offenses, ranging from disrespect for the court to acts otherwise criminal. This Court then went on to state and hold, *Frank v. United States,* 395 U.S. 147 at 149-150:

> "Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion; it has not categorized contempts as 'serious' or 'petty.' 18 U.S.C. §§ 401, 402. Accordingly, this Court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense. See, e.g., Cheff v. Schnackenberg, *supra.* Thus, this Court has held that sentences for criminal contempt of up to six

months may constitutionally be imposed without a jury trial."

Thus, contrary to the contention of Local 70 that the objective indication as to whether a contemptuous offense is a "serious" or a "petty" one is determined by 18 U.S.C. § 1, this Court in *Frank v. United States, supra,* after pointing out that no specific limits have been placed upon the courts in imposing penalties in criminal contempt cases, held that "the maximum penalty authorized in petty offense cases is not simply six months' imprisonment and a $500 fine." 395 U.S. at 150-151, 89 S.Ct. at 1506.

In the instant case the Court of Appeals was not persuaded by *United States v. R. L. Polk & Company,* 438 F.2d 377 (C.A. 6, 1971) which resorted to 18 U.S.C. § 1(3) for a determination of what constitutes a petty offense in a criminal contempt proceeding. The Court below was correct not only in the light of this Court's decision in *Frank v. United States,* 395 U.S. at 150-151, but the Court in *Polk* misread this Court's holding in *District of Columbia v. Clawans* in applying what it regarded as the objective indication to which it was required to resort in determining whether the offense was a "serious" or a "petty one." In *Clawans,* this Court said, 300 U.S. 617, at 628, 57 S.Ct. at 663:

> "Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a guage of its social and ethical judgments."

In *Polk,* the Court engaged in a mechanistic application of 18 U.S.C. § 1(3) and overlooked this Court's reference to taking into account as well the practices of the community as a guage of its social and ethical judgments. In fact, that

Court regarded as its role, for the purpose of finding objective criteria, to look only to "the existing laws of the nation" 438 F.2d at 380. In the instant case, the Court of Appeals properly following this Court's decisions, recognized a distinction where the penalty imposed deprives a person of his liberty as against a monetary penalty which under the laws and practices of the community taken as a guage of its social and ethical judgments, may or may not constitute a serious penalty so as to raise the offense to a "serious" level or lower it to a "petty" one. As the Court of Appeals put it, 492 F.2d at 936:

> "A deprivation of his liberty for a period of more than six months could certainly be serious to any individual, whereas a fine of $500 to a large corporation or to a large union might have no deterrent or punitive effect at all."

Here Local 70 had at the time gross receipts in excess of $700,000 (Pet. Exh. 121, Presentence Report and Recommendations; Tr. 2676-2677). In addition Local 70 had assets of $510,000 (J.A. 46, 67). A net fine of only $10,000, under the circumstances, can hardly be said to be such a penalty as to raise the offense to the status of a "serious" offense and, therefore, require a jury trial.

Where there is no deprivation of liberty at stake, we submit that in the light of *Green, Cheff,* both *supra,* and the other cases referred to herein where fines exceeding $500 were imposed and this Court denied review, the Court below should be affirmed. Also in the light of the historical background discussed in *Green* which supports this Court's holding that criminal contempts are not subject to trial by jury as a matter of constitutional right, this Court must confine the issue of "serious" and "petty" offenses as respects the right to a jury trial to those situations involving

the imposition of imprisonment. We submit that this is required, unless this Court is prepared to upset "a long unbroken line of decisions involving contempts ranging from misbehavior in court to disobedience of court orders", which "establish beyond peradventure that criminal contempts are not subject to a jury trial as a matter of constitutional right." *Green v. United States,* 356 U.S. 165, 183, 78 S.Ct. 632, 643.[7]

2. 18 U.S.C. 3692 Does Not Mandate a Jury Trial Since It Is Not Applicable to Injunctions Under the Labor-Management Relations Act

Local 70 and Muniz urge that under 18 U.S.C. 3692 they were entitled to a jury trial, citing *Frank v. United States,* 395 U.S. 147, 89 S.Ct. 1503. We have discussed that case under the constitutional issue. Suffice it to say that *Frank* did not involve 3692 and that the issue dealt with involved a suspended sentence and probation for three years. This Court held Frank was not entitled to a jury trial. In a footnote, this Court comments that "Congress has provided for a jury trial in certain cases of criminal contempt" and cites, "e.g., 18 U.S.C. §§ 402, 3691, 3692." (395 U.S. 149). This Court then alludes to 18 U.S.C. 3691 and says that it provides for a jury trial in contempts involving willful disobedience of court orders where the "act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state." It holds that the "present case falls within an exception to that rule for cases involving disobedience of any court order 'entered in any suit or action brought or prosecuted in the name of,

7. N. 14 of *Green* lists the major decisions of this Court discussing the relationship between criminal contempts and jury trial, in which it was concluded or assumed that such proceedings are not subject to trial by jury under either Article III, § 2, or the Sixth Amendment.

or on behalf of, the United States.' " Here, then, we have a congressional act which clearly exempts from a jury trial "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States." Thus, not only are such contempts removed from any "constitutional right" to a jury trial, but 18 U.S.C. 3692 must be read in light of Section 10(h) of the Labor-Management Relations Act [29 U.S.C. 160(h)].

As Respondent Regional Director of the Board notes in his brief, Section 3692 was merely a recodification of Section 11 of the Norris-La Guardia Act [29 U.S.C. § 111] and did not expand or alter the scope of Section 11, which limited its application to labor disputes under the Norris-La Guardia Act. When it was part of the Norris-La Guardia Act it was meant to apply solely to injunctions or restraining orders obtained by private parties under the limited provisions of that Act. In the "Historical and Revision Notes" to Section 3692, it is stated that "former section 111 of Title 29, Labor, upon which this section is based, as [sic] inapplicable to injunctions under the Taft-Hartley Act, see section 178 of Title 29."[8]

This Court has heretofore stated that 18 U.S.C. § 3692 was previously section 11 of the Norris-La Guardia Act. *Bloom v. State of Illinois,* 391 U.S. 194, 204, 88 S.Ct. 1477, 1483, n. 6.

For cases holding Section 3692 is not applicable to contempt proceedings under the Labor-Management Relations Act, see, *Madden v. Grain Elevator, Flour and Feed Mill*

8. Section 11 of Norris-LaGuardia was § 111 in 29 U.S.C. See historical note, 29 U.S.C. § 111, 112, p. 494, wherein it is stated that Section 111, Act Mar. 23, 1932, c. 90 § 11, 47 Stat. 72, related to contempts, speedy and public trial, and jury is now covered by section 3692 of Title 18, Crimes and Criminal Procedure. See, also H.R.Rep. No. 304, 80th Congress, 1st Session 9, A 176 (1947); H.R. Rep. No. 152, 79th Congress, 1st Session, A 164 (1945).

Wkrs., Etc., 334 F.2d 1014 (C.A. 7, 1964) where fines of $3000 a day were imposed and this Court denied review, 379 U.S. 967, 85 S.Ct. 661; *Brotherhood of Loc. Fire & Eng. v. Bangor & Aroostook R. Co.,* 380 F.2d 570, 579-580 (C.A. D.C., 1967). See also, *United States v. Robinson,* 449 F.2d 925 (C.A. 9, 1971) where the contemnors contended they were entitled to a jury trial because rule 42(b) states that a "defendant is entitled to a trial by jury in any case in which an act of Congress so provides", and it was further contended that Section 3692 provides a jury trial shall be accorded "In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute."

Accordingly, Section 3692 has no more applicability to contempt proceedings under the Labor-Management Relations Act than did Section 11 of the Norris-La Guardia Act. It is expressly provided in Section 10(h) of the Labor-Management Relations Act [29 U.S.C. 160(h)] that when "granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by sections 101 to 115 of this title."[9]

As for the recent divided decision *In Re Union Nacional de Trabajadores,* 502 F.2d 113 (C.A. 1, 1974), with all due respect to the First Circuit Court of Appeals, the majority opinion is not a well reasoned one. Indeed, the Court in that case, contrary to the holdings of this Court, states "This court has adopted the maximum penalty rule in the context of contempt for disobeying a labor injunction." (502 F.2d

9. Reference to Sections 101 to 115, is to the Norris-La Guardia Act [29 U.S.C. §§ 101-115].

116) It cites its opinion in *In re Puerto Rico Newspaper Guild Local 225,* 476 F.2d 856, where it said it starts "from the common ground that there is a constitutional right to a jury trial in cases of serious criminal contempts . . . and that the seriousness of the offense is to be determined by reference to the penalty imposed." In a footnote it states that "In most situations, the seriousness of an offense will be determined by looking to the maximum penalty authorized by statute for its commission." 476 F.2d at 857-858. The First Circuit majority rejecting the reasoning in *Madden v. Grain Elevator, Flour and Feed Mill Wkrs.,* 334 F.2d 1014 (C.A. 7, 1964) says that Court in considering Section 3692 did not give "extensive consideration of alternatives", and reached a conclusion "summarily" that Section 3692 covers matters formerly found in § 11 of the Norris-La Guardia Act. 502 F.2d at 117. Referring to *Madden* and the Court of Appeals opinion in the instant case, the First Circuit majority says (at 117):

> "Neither case, in our opinion, revealed sufficient analysis underlying the conclusion to be preclusive or persuasive. *Madden* simply states a conclusion, while, as we note below, *Hoffman's* fear of any limitation on the Board's equitable powers is misplaced."

The First Circuit majority also says *Madden* and *Hoffman* did not deal with "the scope and applicability of § 3692." A reading of those two cases reveals the error of the First Circuit majority. A better reasoned opinion in *Union Nacional de Trabajadores* is the dissent. 502 F.2d 121.

In sum, Section 3692 is not to be read as broadly as in the majority opinion in *In Re Union Nacional de Trabajadores, supra,* but as continuing the exception with respect to injunctions under the Labor-Management Relations Act.

When Congress placed former Section 11 of the Norris-La Guardia Act [29 U.S.C. § 111] in the recodification as Section 3692, it was aware of Section 10(h) [29 U.S.C. § 160 (h)] in the Labor-Management Relations Act and did not repeal or modify that section.

Congress not having repealed or modified section 10(h), then it follows that section 3692 must be construed in the light of the exemption which Congress made by enacting 10(h) expressly for cases involving injunctions under the Labor-Management Relations Act.

3. It Is Doubtful That Petitioners Have Standing to Urge Their Contentions

While we would like to have this Court resolve the issues raised, we feel an obligation to bring to the Court's attention the posture of the petitioners which raises a question as to their standing before this Court.[10]

Local 70 and Muniz did not raise the jury issue in the Court of Appeals. In their brief below, although Local 70 and Muniz state they "join and adopt all of the argument made by counsel for each of the other Labor Organizations and individuals found to be in contempt with respect to procedural, substantive and given [sic] matters", they state their brief "will dwell only on matters that are of particular concern to Local 70 and James Muniz" (Muniz and Local 70 Br., p. 3). No where in that brief do they discuss the jury issue. In their petition for rehearing in the Court of Appeals, they only assert two grounds, (1) notice of the injunctions and (2) the quantum of proof. They apparently

10. We referred to this in a footnote in our brief in opposition to the petition for a writ of certiorari, although we subsequently joined with the Solicitor General and Counsel for the Board in urging granting review limited to the questions now involved.

did not regard the jury issue of "particular concern" to them (Muniz and Local 70 Pet. for Rehearing, pp. 1-2).

Therefore, petitioners are in no position to advance such issue now. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598; *State v. Taylor*, 353 U.S. 553, 77 S.Ct. 1037, 1039, n. 2.

VII
CONCLUSION

It is submitted that the decision below should be affirmed.

Respectfully submitted,

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February 10, 1975.